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IN THE
Supreme Court of the United States

SKF USA INC.,

Petitioner,

V.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF KOYO CORPORATION OF U.S.A. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 5

REASONS FOR GRANTING THE WRIT 5

ARGUMENT 10

I. The Federal Circuit Erred, As a Matter Of Law, by Failing to Assess an Explicit Viewpoint Based Discrimination Against Political Speech Under the Strict Scrutiny Standard 10

A. The Federal Circuit's Decision Violates Important First Amendment Principles Established By An Unbroken Series of This Court's Decisions Prohibiting Viewpoint Discrimination Against Political Speech 10

B. The Byrd Amendment Embodies Classic Viewpoint Discrimination Involving Political Speech 13

II. The Viewpoint Based Discrimination Accomplished By the Byrd Amendment Is Particularly Pernicious Because it Occurred in the Course of a Formal Procedure in Which the Government Sought to Determine How to Exercise its Authority and in Which All Citizens Have an Equal Right to Participate and be Heard 15

A. Speech Made By Private Parties in the Course of a Formal Governmental Decision-Making Process Enjoys Heightened First Amendment Protection 15

B. The Court Should Grant Review Because of the Dangerous Nature of the Precedent Established by the Federal Circuit's Incorrect First Amendment Analysis 19

III. The Federal Circuit's "Reward" Theory Fails Because in Trade Remedy Investigations the Government Acts in a Formal, Representative Capacity, and Not As an Injured Party Seeking Redress 21

A. The Government Was Acting in its Representative Capacity in the ITC Proceeding 22

B. The "Reward" Theory Is Invalid Because There is No Connection Between the Support Granted By a Party in the Course of the Formal ITC Investigation and the Amount of the Benefit Received 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Federal Cases

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 11

BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002) 18-19

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 19

Boos v. Barry, 485 U.S. 312 (1988) 15

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 5, 17, 18

Citizens United v. FEC, 558 U. S. ___, No. 08-205, slip op. at 32 (Jan. 21, 2010) 19

Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 5, 8, 16, 17

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 22, 23

Illinois v. Krull, 480 U.S. 340 (1987) 21

Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board, 172 F.3d 397 (6th Cir. 1999), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002) 20

Leathers v. Medlock, 499 U.S. 439 (1991) 11, 12

McDonald v. Smith, 472 U.S. 479 (1985) 16

Mills v. Alabama, 384 U.S. 214 (1966) 15

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 12

Perry v. Sindermann, 408 U.S. 593 (1972)..... 10

Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49 (1993) 16, 18

Regan v. Time, Inc., 468 U.S. 641 (1984) 12

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 7, 10

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)..... 7, 11, 12

SKF USA, Inc. v. U.S. Customs & Border Prot., 556 F.3d 1337 (Fed. Cir.), *en banc rehearing denied*, 583 F.3d 1340 (Fed. Cir. 2009)..... *passim*

Speiser v. Randall, 357 U.S. 513 (1958) 13

Suramerica de Aleaciones Laminadas v. United States, 44 F.3d 978 (Fed. Cir. 1994)..... 24

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)..... 10

United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) 16, 17

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 13

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) ... 22, 23

Constitutional Provisions

U.S. CONST. amend. I 15

Statutes

Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1(a), § 1002 (2000) (previously codified at 19 U.S.C. § 1675c) (2000 & Supp. 2006) 2

19 U.S.C. § 1675c(a) 3, 25, 27

19 U.S.C. § 1675c(b)(1) 3, 13, 26

19 U.S.C. § 1675c(b)(1)(A) 13

19 U.S.C. § 1675c(b)(4) 3, 25, 26

19 U.S.C. § 1675c(d)(2) 3, 25

19 U.S.C. § 1675c(d)(3) 3, 25

Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title VII, Subtitle F § 7601(a) 4

19 U.S.C. § 1333(a) 26

19 U.S.C. § 1671 (2006) 1

19 U.S.C. § 1671b (2006) 24

19 U.S.C. § 1673 (2006) 1

19 U.S.C. § 1673b(b) (2006) 24

31 U.S.C. § 3730(b) (2006) 22

Regulatory Materials

19 C.F.R. § 159.61(a)-(c) (2009) 3

19 C.F.R. § 207.8 (2009) 24

19 C.F.R. § 207.20-29 (2009) 24

Agency Determinations

Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, & Spherical Plain Bearings, & Parts Thereof From Japan, 54 Fed. Reg. 20904 (Dep't of Commerce May 15, 1989) 2

Other Authorities

Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 Hous. L. Rev. 1299 (2003) .....

Black's Law Dictionary (8th ed. 2004) 16

J. Boese, *Civil False Claims and Qui Tam Actions* (3rd ed. 2006) 22

Fiscal Year 2008 CDSOA Annual Disbursement Report, available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_annual_rep/final_disbursement.ctt/final_disbursement.pdf 23

Fiscal Year 2009 Annual CDSOA Disbursement Report, available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf 4-5

The Year in Trade 2007: Operation of the Trade Agreements Program (59th Report), USITC Pub. 4026 (July 2008) 4

U.S. Customs and Border Protection FY 2009 Certifications Received, available at http://www.cbp.gov/linkhandler/cgov/trade/

priority_trade/add_cvd/cont_dump/cdsoa_09/09certs_receive.ctt/09certs_receive.pdf 5

INTEREST OF AMICUS CURIAE

Koyo Corporation of U.S.A. ("Koyo")[1] is a domestic manufacturer of products on which an antidumping duty order is in place.[2] Since 1975, Koyo has manufactured tapered roller bearings and ball bearings and continues to make substantial investments in its bearings manufacturing facilities in the United States.

The U.S. antidumping and countervailing duty laws, Title VII of the Tariff Act of 1930,[3] provide the basis for U.S. Customs and Border Protection ("Customs") to assess antidumping duties on imported merchandise subject to an antidumping order. Like Petitioner SKF USA, Inc., Koyo was an interested party that fully participated in the antidumping investigation on Ball Bearings from Japan (among twelve other antidumping and countervailing duty investigations on ball bearings and tapered roller bearings from various countries). It responded to mandatory questionnaires from, and

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[1] The parties have consented to the filing of this *Amicus* brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6 *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] Koyo's parent company is JTEKT Corporation, a manufacturer of bearings located in Japan, formerly known as Koyo Seiko Ltd.

[3] 19 U.S.C. §§ 1671, 1673, *et seq.* (2006).

provided a significant amount of information to, the United States International Trade Commission ("ITC"), the agency responsible in antidumping and countervailing ("AD/CVD") duty investigations for determining whether a domestic industry has been materially injured or threatened with material injury by the relevant imports. As part of the ITC's formal investigation of whether domestic producers, including Koyo, had suffered material injury, *Amicus* stated in its ITC questionnaire response that it did not support the petition for the imposition of antidumping duties.

In 1989, after completion of the ITC investigation, the U.S. Department of Commerce issued the antidumping duty order on ball bearings imported from Japan (the "Order"). *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, & Spherical Plain Bearings, & Parts Thereof From Japan*, 54 Fed. Reg. 20904 (Dep't of Commerce May 15, 1989). In 2000, many years after publication of that Order and therefore many years after Koyo checked a box on its ITC questionnaire opposing the petition, the AD/CVD duty law was amended by the Continued Dumping and Subsidy Offset Act ("CDSOA") commonly known as the "Byrd Amendment." *See* Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1(a), § 1002 (2000), 19 U.S.C. § 1675c (2000 & Supp. 2006). The Byrd Amendment takes antidumping duties collected under an antidumping duty order and pays them to certain domestic producers, who satisfy the "petition support" requirement. Under the "support requirement," eligibility for Byrd Amendment distributions is limited to "Affected

domestic producer[s]" ("ADPs"), who are defined as petitioners or those who supported a petition that led to an antidumping or countervailing duty order. *Id.* § 1675c(b)(1). Customs annually publishes the ADP lists in the Federal Register, along with a notice of intent to distribute AD/CVD duties that were collected in that fiscal year. *Id.* § 1675c(d)(2). Each year, Customs distributes the duty collections, on a pro rata basis, to the ADPs who filed the required certifications with Customs, based on the ADPs' "qualifying expenditures" for that year. *Id.* §§ 1675c(a), 1675c(b)(4), 1675c(d)(2)-(3); 19 C.F.R. § 159.61(a)-(c) (2009).

Koyo is excluded from the ADP lists and from the distribution of duties because it does not satisfy the "support requirement," *i.e.*, publicly expressed support for the petition in the course of the ITC formal investigation.

Since 2001, domestic producers have had access each year to a pro rata share of the AD/CVD duty collections, so long as during the original investigation (which may have occurred years before 2001), they publicly expressed the viewpoint that they supported the petition for the imposition of an antidumping duty order and such order was imposed. Domestic producers who expressed the opposite viewpoint, or no viewpoint, have not received any Byrd Amendment distributions. Domestic producers that compete with Koyo in the U.S. market received Byrd Amendment distributions, placing Koyo and other similarly

situated domestic producers at a significant competitive disadvantage.[4]

Although the CDSOA was repealed prospectively in February 2006, Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title VII, Subtitle F § 7601(a), it continues to apply to AD/CVD duties collected on entries made and filed prior to October 1, 2007, including the Order involved in this case. More than 250 AD/CVD duty orders affecting a variety of industries were in effect at the time of the CDSOA repeal.[5] Determining the final AD/CVD duty liability for entries made before October 1, 2007 under each preexisting order will be a long process, such that the continuing harm to Koyo and other similarly situated producers affected by the discriminatory distributions under the CDSOA to domestic competitors will continue for years to come.[6] For fiscal year 2009, more than 8,000

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[4] For example, the *Fiscal Year 2008 CDSOA Annual Disbursement Report* for thirteen different AD/CVD orders indicates that more than $17 million has been distributed to Koyo's competitors with regard to ball bearings and tapered roller bearings. Available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_annual_rep/final_disbursement.ctt/final_disbursement.pdf (amount aggregated from this report).

[5] *See The Year in Trade 2007: Operation of the Trade Agreements Program (59th Report)*, USITC Pub. 4026, at App. Table A-5 & A-7 (July 2008).

[6] In fiscal year 2009 alone, Customs distributed $247,718,477.35, with an additional $75,845,186.86 set aside for distribution. *See Fiscal Year 2009 Annual CDSOA Disbursement Report*, available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_c

certifications were filed with Customs requesting Byrd Amendment funds.[7]

Koyo's claims for distributions under the Byrd Amendment are pending before the Court of International Trade. *See e.g., Koyo Corp. of U.S.A. v. United States*, No. 06-00324 (Ct. Int'l Trade), consolidated as *Pat Huval Restaurant & Oyster Bar, Inc v. USITC*, Consol. No. 06-00290 (Ct. Int'l Trade).

INTRODUCTION

The Court of Appeals for the Federal Circuit incorrectly applied the First Amendment to permit viewpoint based discrimination against highly-protected political speech in a formal governmental proceeding. The decision of the Federal Circuit conflicts with numerous decisions of this Court, particularly with respect to its application of intermediate tier scrutiny to review governmental discrimination against core political speech made to an administrative agency in the course of a formal government proceeding. *See e.g., Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

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vd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf.

[7] *See U.S. Customs and Border Protection FY 2009 Certifications Received*, available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/09certs_receive.ctt/09certs_receive.pdf.

The erroneous Federal Circuit decision will be controlling authority for many other pending cases over which it has exclusive appellate jurisdiction, and that present the same issue. Current cases and anticipated future cases collectively involve claims exceeding $1 billion, as indicated in SKF USA, Inc.'s Petition.

Unless this Court grants the Petition for a Writ of Certiorari to review the judgment of the Federal Circuit, this case will have an unprecedented outcome by permitting the government acting in its representative capacity to reward private parties with money for supporting certain substantive policy positions in a formal public process.

REASONS FOR GRANTING THE WRIT

The Byrd Amendment's "petition support" requirement is a classic example of a viewpoint discriminatory restriction on political speech that cannot survive strict scrutiny. The Petition should be granted because the Federal Circuit's decision[8] upholding the restriction violates important First Amendment principles established by an unbroken series of this Court's decisions that prohibit viewpoint discrimination against political speech, unless the government can point to a compelling

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[8] *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337 (Fed. Cir.), *en banc rehearing denied*, 583 F.3d 1340 (Fed. Cir. 2009).

governmental interest and demonstrate that the approach taken is the least restrictive alternative. *See e.g. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Although the Byrd Amendment discriminates on its face among members of a domestic industry based on a public policy related viewpoint, the Federal Circuit ignored this discrimination and erred as a matter of law by assessing the statute under the intermediate scrutiny standard. *SKF*, 556 F.3d at 1352, 1355.

The unconstitutionality of the statute is particularly evident because the discrimination occurred in the course of an official proceeding in which a federal administrative agency received the views of the public, including those of Petitioner and of the *Amicus*, and made an important policy decision. Repeated decisions of this Court demonstrate that the First Amendment protection is at its zenith in this context, when a member of the public communicates with the government acting in a representative capacity to inform the government of its views about appropriate policy actions:

> In a representative democracy such as this, these branches of government [the legislature and executive] act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet

> hold, at the same time, that the people cannot freely inform the government of their wishes would impute to [the statute] a purpose to regulate . . . political activity . . . .

Noerr, 365 U.S. at 137.

By conditioning receipt of a monetary payment on the expression of a particular position to the administrative agency charged with making a decision, the Byrd Amendment's petition support requirement restricts political speech and communication with the government as decision-maker. Yet the majority below improperly side-stepped the application of strict scrutiny to assess the statute. Instead, it decided to treat the Byrd Amendment distributions as a "reward" and reached the conclusion that this type of "reward" should be permitted in a commercial context. *SKF*, 556 F.3d at 1355. It then concluded that the "reward" should be reviewed under the intermediate scrutiny standard applicable to commercial speech, although no available First Amendment rationale justified its application to a viewpoint-based discrimination against political speech made to the government acting in its representative capacity.

As Petitioner has shown, in its effort to devise a rationale, the majority's formulation conflicts in several respects with principles established by prior decisions of this Court. In particular, the majority erred by asserting that a different standard applies to "prohibitions" of speech and the type of unvarnished viewpoint discrimination involved here, and that a finding of benign purpose for the statute

is sufficient to convert the standard of review from strict scrutiny to intermediate scrutiny. *Id.* at 1349. However, the majority's theory of a saving "reward" purpose is invalid because in trade remedy investigations the government is not acting as a litigant before a court, seeking to protect its proprietary interest, but is acting in a representative capacity, in a matter of public policy.

Finally, the decision below warrants review because of the continuing harm the Byrd Amendment will cause to scores of domestic producers excluded from receiving benefits and the potential danger this decision presents to critical First Amendment rights if it is permitted to stand. Koyo and other similarly situated domestic producers, including those that are parties to more than 41 cases pending in the lower court (over which the Federal Circuit has exclusive jurisdiction), will suffer continuous harm because some domestic competitors will continue to receive a stream of Byrd Amendment payments for many years to come.

At a broader level, the Federal Circuit's decision establishes a new and unwarranted exception to the application of strict scrutiny to content-based restrictions on political speech. The dissent warned against the creation of "a whole new category of speech – speech in circumstances that are 'similar to' commercial speech" which is then subject "to much less rigorous scrutiny under the First Amendment than it would otherwise receive." *SKF*, 583 F.3d at 1343. In characterizing the impact of the panel's decision as "far reaching," the dissent properly concluded that "[t]his case is simply too

important to allow the majority's incorrect First Amendment analysis to stand." *Id.*

ARGUMENT

I. The Federal Circuit Erred, As a Matter Of Law, by Failing to Assess an Explicit Viewpoint Based Discrimination Against Political Speech Under the Strict Scrutiny Standard

A. The Federal Circuit's Decision Violates Important First Amendment Principles Established By An Unbroken Series of This Court's Decisions Prohibiting Viewpoint Discrimination Against Political Speech

The First Amendment prohibits the government from discriminating among speakers based on the viewpoint they express, unless it can satisfy the strict scrutiny standard. The government may not discriminate based on viewpoint by disadvantaging or burdening those who have an opposite view or by requiring entities to utter a particular viewpoint to qualify for government benefits. *See e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Rosenberger*, 515 U.S. at 829. A viewpoint-based discrimination is presumed unconstitutional in these circumstances and is subject to strict scrutiny even if the political speech involves economic matters. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[The government] . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.")

The Court has recognized that preventing a speaker from receiving monetary compensation can curtail speech by eliminating an economic incentive for the entity to speak. In *Simon & Schuster*, the Court declared unconstitutional under the First Amendment a statute that denied a criminal the income from communications describing his crime and required that these funds be deposited in a trust account to be made available to victims of his crimes. The underlying statute did not prohibit any speech. Rather, it established "a financial disincentive to create or publish works with a particular content." *Simon & Schuster*, 502 U.S. at 118.

In reaching this conclusion, the Court stated that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115. The Court quoted with approval its decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), where it had invalidated a content-based magazine tax on the ground that such "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."

As the Court explained, "This is a notion so engrained in our First Amendment jurisprudence" that it has found it "so 'obvious' as to not require explanation." *Simon & Schuster*, 502 U.S. at 115-16, quoting *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). This rule is but one manifestation of a far broader principle: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the

First Amendment." *Simon & Schuster*, 502 U.S. at 116, quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

Simon & Schuster reinforced the conclusion of *Leathers* that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 116, quoting *Leathers*, 499 U.S. at 448-49.

The majority's decision, which purports to draw a distinction between "prohibitions" of speech and viewpoint discriminatory restrictions on speech, is squarely inconsistent with this Court's First Amendment precedents. Moreover, the Court has specifically rejected the majority's position that an alleged benign governmental purpose can save this type of viewpoint-based discrimination. The Court has rejected the argument that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. "[O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster*, 502 U.S. at 117, quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

Further, in *United States v. National Treasury Employees Union*, the Court found that a government "prohibition on compensation unquestionably imposes a significant burden on expressive activity" and "induces" those covered by the statutory restriction "to curtail their expression"

in order to prevent adverse effects on their financial situation. 513 U.S. 454, 468-70 (1995), citing *Simon & Schuster*. *See also Speiser v. Randall*, 357 U.S. 513 (1958), where the Court declared unconstitutional a state law conditioning a tax exemption to a signed declaration of loyalty to the U.S. government. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518.

The Byrd Amendment's "petition support" requirement is virtually indistinguishable from the unconstitutional limitations on speech at issue in this line of cases, which establishes that restrictions on payment for speech constitute infringements on expression that must satisfy the strict scrutiny standard in order to survive review.

B. The Byrd Amendment Embodies Classic Viewpoint Discrimination Involving Political Speech

The Byrd Amendment provides benefits to an entity that "was a petitioner or interested party in support of the petition with respect to which" AD/CVD duties were ordered. 19 U.S.C. § 1675c(b)(1)(A). This provision explicitly directs the ITC and Customs to discriminate among domestic producers found to be injured by dumped imports in the distribution of Byrd Amendment subsidies based solely on whether a producer publicly expressed "support" for a petition that led to an AD/CVD order. *Id.* § 1675c(b)(1). Koyo was denied Byrd Amendment distributions because like Petitioner SKF USA, in its questionnaire response to the ITC many years before

the enactment of that law, Koyo did not check the box asking whether it supported the petition. On its face, the Byrd Amendment thus embodies a content-based discrimination that both rewards entities whose speech is consistent with a specific policy view about the desirability of government action and punishes those whose speech takes an opposing point of view.

The majority rejected the government's position in this litigation that the Byrd Amendment's petition support requirement was not viewpoint discriminatory. *SKF*, 556 F.3d at 1351. It did not, however, assess the statute under the strict scrutiny standard. Instead, the majority applied the lesser degree of constitutional protection afforded commercial speech. It cited no authority that permitted such use of the intermediate scrutiny standard to assess the validity of political speech in a public forum.

In sum, the Federal Circuit's decision conflicts with numerous decisions of this Court. The Petition should be granted in light of the importance of the First Amendment rights that have been violated by the decision below.

II. The Viewpoint Based Discrimination Accomplished By the Byrd Amendment Is Particularly Pernicious Because it Occurred in the Course of a Formal Procedure in Which the Government Sought to Determine How to Exercise its Authority and in Which All Citizens Have an Equal Right to Participate and be Heard

A. Speech Made By Private Parties in the Course of a Formal Governmental Decision-Making Process Enjoys Heightened First Amendment Protection

First Amendment protections are at their zenith when the communication at issue is political speech that occurs in a public forum maintained by the government. *Boos v. Barry*, 485 U.S. 312 (1988). As this Court said in *Mills v. Alabama*, 384 U.S. 214, 218 (1966), "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." Political speech in various types of public forums, whether petitioning Congress for taking a certain action or submissions to government agencies in administrative proceedings, implicates broader First Amendment protections: not only the right to freedom of speech but also the right to petition the government for redress of grievances. *See* U.S. CONST. amend. I. The Byrd Amendment's petition support requirement impermissibly burdens both fundamental rights, requiring *a fortiori* that the

statute be assessed under the strict scrutiny standard.

This Court's jurisprudence has long recognized the vital nature of the right to petition the government for redress of grievances. *McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First Amendment] . . ."); *Noerr*, 365 U.S. at 136; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).[9] The *Noerr-Pennington* line of cases is clearly meant to protect the ability of the government acting in its representative capacity to take measures that affect competition and the ability of citizens to request or oppose such government action without threat of discrimination or retribution for the substantive position they take. *Noerr*, 365 U.S. at 137; *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993). As the *Noerr* Court noted, petitioning activity is by its nature "directed toward obtaining governmental action." 365 U.S. at 140.

In *Noerr* the Court addressed an antitrust challenge to a lobbying and publicity campaign. Because lobbying and speech "raise[d] important constitutional questions," the Court held that Congress did not intend the Sherman Act to "apply

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[9] *See* Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 Hous. L. Rev. 1299, 1303-09, 1342-43 (2003) (discussing the development of the right to petition under the First Amendment and the application of the strict scrutiny standard).

to the activities of the railroads at least insofar as those activities comprised mere solicitation of government action with respect to the passage and enforcement of laws." *Id.* at 138. The Court was concerned that

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to [the statute] a purpose to regulate . . . political activity . . . .

Id. at 137.

The Court further explained that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

In *Pennington*, the Court extended the *Noerr* protection to lobbying efforts designed to influence executive officials performing commercial and political duties. 381 U.S. at 670. In *California Motor Transport Co. v. Trucking Unlimited*, the Court further extended the right to petition to administrative agencies and courts: "The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." 404 U.S. 508, 510 (1972). Having explained that the right to petition "extends to all

departments of the Government," the Court concluded that:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.

Id. at 510-11 (emphasis added).

The need for strict scrutiny on speech when the government is acting in its representative capacity is confirmed by *Professional Real Estate Investors*, 508 U.S. at 5. The Court stressed the First Amendment protection on the free flow of communications to the government:

> We reasoned that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." (citations omitted).

In *BE & K Constr. Co.*, the Court applied the *Noerr* principles outside the competition context to labor disputes. *BE & K Constr. Co. v. NLRB*, 536

U.S. 516, 525-527 (2002).[10] Retracing the origins of the *Noerr* doctrine, the Court affirmed its continued application and the view that the government cannot penalize a party for its protected speech absent both objective and subjective evidence of bad faith. Most recently, the Court relied on the *Noerr* line of cases in holding unconstitutional under the First Amendment a law that "placed restrictions on political speech based on the speaker's corporate identity..." *Citizens United v. FEC*, 558 U. S. ___, No. 08-205, slip op. at 32 (Jan. 21, 2010).

The majority acknowledged that SKF USA's opposition to the antidumping petition in the ITC investigation is protected First Amendment activity. *SKF*, 556 F.3d at 1354, citing *Professional Real Estate Investors* and *California Motor Transport*. Any action by an administrative agency to punish a petitioner for exercising a fundamental constitutional right to inform the government of its views about appropriate policy actions must be subject to the highest level of scrutiny, not some lower intermediate form.

B. The Court Should Grant Review Because of the Dangerous Nature of the Precedent Established by the Federal Circuit's Incorrect First Amendment Analysis

The Court should grant review because the Federal Circuit's decision would constitute an

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[10] *See also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), applying *Noerr* principles to the National Labor Relations Act.

important precedent permitting the government to reward citizens with money for supporting in a formal public process the substantive policy position adopted by the government. This outcome is unprecedented and the potential for abuse is chilling.

As explained by the dissent, in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999), *appeal after remand*, 276 F.3d 876 (6th Cir. 2002), the Sixth Circuit overturned a similar effort by a government to discriminate on the basis of viewpoint regarding political speech that occurred in a referendum process. *SKF*, 556 F.3d at 1376. *Lac Vieux* supports SKF USA's position here, holding that the discriminatory ordinance at issue was subject to strict scrutiny. 172 F.3d at 409-10.

Equally important, the injurious effects of the Byrd Amendment will continue even after the last distribution under this statute is made. Domestic producers in future AD/CVD proceedings may be compelled to express a viewpoint in favor of governmental action in order not to foreclose potential future access to similar monetary benefits. *See id.* at 407 (noting the chilling effect on speech as "limit[ing] the ability of persons or entities to take a particular political position freely.")

The fact that Congress has authorized the government to award money to private parties that take substantive positions that agree with a particular policy outcome – here, the imposition of duties – and to deny recovery to those who oppose such action is a dangerous innovation whose legality

should be reviewed before it can serve as a precedent supporting future actions by Congress to discriminate based on viewpoint in the award of money in other contexts. *See Illinois v. Krull*, 480 U.S. 340, 352 (1987) ("[T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes.").

III. The Federal Circuit's "Reward" Theory Fails Because in Trade Remedy Investigations the Government Acts in a Formal, Representative Capacity, and Not As an Injured Party Seeking Redress

In assessing the Byrd Amendment under the intermediate scrutiny standard, the majority articulated two rationales, not advanced by the government, that purportedly justified the discrimination: that (1) the statute was designed to reward parties who supported government policy in enforcing U.S. trade laws, and (2) petitioners/supporters of the imposition of an AD/CVD order occupy the same position as plaintiffs in *qui tam* actions. *SKF*, 556 F.3d at 1352. Neither rationale is a valid basis for the majority's First Amendment analysis. Moreover, the government expressly disclaimed before the Federal Circuit the "reward" theory on which the majority decided the case. *Id.* at 1350; *SKF*, 583 F.3d at 1342.

A. The Government Was Acting in its Representative Capacity in the ITC Proceeding

The majority's "reward" theory is rooted in the incorrect premise that issuance of a remedial order in an AD/CVD proceeding is equivalent to a successful *qui tam* judgment. *SKF*, 556 F.3d at 1355-57. On that basis, the majority reasoned that a Byrd Amendment distribution is properly considered a bounty for supporters of the order. *Id.* However, the two proceedings are fundamentally different, and the government acts in a different capacity in the two proceedings.

A *qui tam* suit is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government . . . will receive." *Black's Law Dictionary* 1282 (8th ed. 2004). For example, the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b) (2006) permits private parties to combat fraud against the United States by bringing a civil action against a person who submitted a false claim. *See e.g. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

Qui tam plaintiffs ("relators") are volunteer prosecutors, motivated by the prospect of personal gain, that sue to redress a fraud against the government in its proprietary capacity. While the *qui tam* relator may obtain a portion of the penalty as a bounty for prosecuting a successful action, it is the government that is the injured party. *Vermont Agency*, 529 U.S. at 772-73; *see also Hughes Aircraft*,

520 U.S. at 949 (relators "are motivated primarily by prospects of monetary reward rather than the public good"). In fact, the *qui tam* relators are not injured by defendants' conduct and lack direct standing.[11] It is a unique feature of *qui tam* statutes that relators are granted derivative standing to sue to redress an injury suffered by the government in its proprietary, as opposed to representative, capacity. *Vermont Agency*, 529 U.S. at 771. Further, the *qui tam* relator's "reward" is not contingent on the expression of a particular viewpoint required by statute.

Unlike *qui tam* provisions, the Byrd Amendment and the AD/CVD laws are not anti-fraud statutes. In AD/CVD investigations, the government and AD/CVD petition supporters play fundamentally different roles than parties in a *qui tam* action. The AD/CVD petition supporters seek to persuade a federal agency, acting in its representative capacity, that they have been directly injured by unfair competition from foreign imports and to remedy that injury through imposition of duties. Their communication with the government in its representative capacity is akin to the protected petitioning activity under *Noerr-Pennington*.[12] They are seeking to enforce their own rights, not those of the government. In doing so, they are compelled to express a point of view to the ITC: that they support the imposition of an AD/CVD order.

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[11] J. Boese, *Civil False Claims and Qui Tam Actions* 1-4 - 1-7 (3d. ed. 2006).

[12] As noted *supra* at page 18, SKF USA's opposition to the antidumping petition in the ITC investigation is protected First Amendment activity under *Noerr*.

The ITC does not act as a private litigant seeking recovery for fraudulent actions, but is a neutral fact-finding and decision-making body with respect to matters of trade policy. Specifically, in an AD/CVD investigation, the ITC plays: (1) an investigative role, in which it sends questionnaires to domestic producers who may either support or oppose the imposition of AD/CVD duties, analyzes this data, conducts independent research, and issues a comprehensive analysis; and (2) a decision-making role, in which it determines the existence of material injury to the domestic industry.[13] The ITC conducts the investigative and decision-making roles in its representative capacity and may not share or decline its responsibility. [14]

A priori every completed investigation represents the "successful enforcement of AD/CVD laws," regardless of whether it results in issuance of AD/CVD orders or not. The ITC's statutory responsibility is fulfilled by a determination of whether there is a need for relief under the statutory standards.

The majority thereby erred in finding that petitioners "help" the government or take a position "favorable to" the government. *SKF*, 556 F.3d at

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[13] *See* 19 C.F.R. §§ 207.8, 207.20-29 (2009); 19 U.S.C. §§ 1671b, 1673b(b) (2006).

[14] Similarly, "[i]n making a determination of threat of material injury, ITC must weigh industry views and views of other interested parties, together with all other relevant economic factors as appropriate. . . ." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 984 (Fed. Cir. 1994).

1356-57. The majority's analogy of Byrd Amendment distributions to bounties is wrong and cannot justify the statute's discrimination against protected speech.

B. The "Reward" Theory Is Invalid Because There is No Connection Between the Support Granted By a Party in the Course of the Formal ITC Investigation and the Amount of the Benefit Received

The language of the Byrd Amendment and the manner in which distributions are made refute the majority's "reward" theory. First, under the majority's reading of the statute, once an entity has provided assistance to the ITC in an investigation, it should be eligible for Byrd Amendment distributions. *Id.* at 1352. But that is not how the statute operates. Instead, the qualifying expenditures to which distributions are tied are not based on a one-time determination. 19 U.S.C. §§ 1675c(a), 1675c(b)(4), 1675c(d)(2)-(3). Rather, Byrd Amendment distributions are made only to an entity that meets the definition of "affected domestic producer" each time it applies for benefits and has "qualifying expenditures" at that time.

Second, eligibility for Byrd Amendment distributions is not related to the information provided to the ITC in the investigation, or its quality/substance/volume, as would be expected if the distribution mechanism actually functioned as a "reward."[15] Further, responses to the ITC

[15] In fact, an entity who merely checked the "petition support" box in the ITC questionnaire can receive larger distributions

questionnaires are mandatory and a failure to respond can result in a subpoena or other order to compel the submission of records or information. 19 U.S.C. § 1333(a). The mandatory nature of the ITC questionnaires is inconsistent with the majority's reading of the statute.

Third, under the "reward" theory, once a party has been determined to have assisted the ITC in an investigation, it should be eligible for Byrd Amendment distributions for as long as funds are available. But that is not true for all such parties. Section 1675c(b)(1) provides that a party who supported and assisted in the original investigation and then "ceased the production of the product covered by the order or finding . . . shall not be an affected domestic producer." It thus will not be eligible to receive distributions, even though it may have qualifying expenditures that had not yet been reimbursed through Byrd Amendment distributions. 19 U.S.C. § 1675c(b)(4). The fact that a company can support the AD/CVD petition, and then receive no benefits if it ceases to manufacture the covered product at any time after the AD/CVD order is issued, contradicts the majority's depiction of the statute's purpose.

The Byrd Amendment permits members of the domestic industry to receive subsidies from the government (payment of part of the duties imposed under an AD/CVD order) upon one condition -- if and only if the producer publicly expressed support for the petition in the course of the administrative

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than an entity who supported the petition with significant information and analysis.

proceeding. *Id.* § 1675c(a). That is, to receive monetary benefits from the government in its representative capacity, a company need only check a box on an ITC questionnaire when it responds to compulsory process for production of information. Accordingly, the Federal Circuit erred by basing its decision on the fatally flawed "reward" theory.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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